IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

No. 64-109

FILBEY EQUIPMENT COMPANY, A Corporation,	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court for the Third Judicial Circuit, Madison County, Illinois.
-vs-	)	
HUGH MAJOR,	)	
Defendant-Appellant.	)	

MORAN, GEORGE, J.

This is an appeal by the defendant-appellant, Hugh Major, from a judgment of the Circuit Court of Madison County, Illinois in a case tried before the court without a jury, wherein judgment was entered for the plaintiff in the amount of $4,876.85 and against the defendant on his counter-claim.

On March 30, 1960 plaintiff filed suit for the balance due on a cognovit note given for the sale of two Andrews trailers which were repossessed and sold leaving a deficiency. Judgment was entered by the court at that time for the sum of $3,630.00. Plaintiff then instituted a

same condition as it was at the time the agreement to purchase had been entered into and that it had been damaged in the interim to the amount of $850.00; that approximately three weeks after the delivery of the second trailer, plaintiff delivered the third trailer to the defendant who paid $900.00 down on the second and third trailers; however, at that time the plaintiff agreed that the second and third trailers were in bad shape and that he would sell them to some other party so that neither he nor the defendant would lose any money on the transaction; that the fourth trailer was never delivered to the defendant although he had paid the plaintiff $300.00 as a down payment, given him a note for $400.00 and paid one payment of $153.14 to the Union National Bank of East St. Louis. Defendant further alleged that the plaintiff sold the fourth trailer for the sum of $5,000.00 and agreed to settle up the difference with the defendant when the deal was completed; that shortly thereafter, plaintiff sent a man to pick up two trailers which had previously been delivered to the defendant, indicating that he was buying the trailers and that plaintiff would refund to the defendant money due him in connection with sales and rentals of these trailers; that he has paid to the Union National Bank of East St. Louis $5,356.59 on contracts in

connection with three trailers but the plaintiff had never made any settlement with the defendant in that transaction. Defendant then claimed that plaintiff owed him $3,101.84 on the sale of one of the trailers, a refund of the down payment of $300.00 and the monthly payment of $153.14 which was paid on the fourth trailer.

The evidence was in sharp dispute. Plaintiff's evidence indicated that on November 9, 1956, defendant signed a conditional sales note and contract for the purchase of a thirty-two foot Dorsey refrigerated trailer for a total price of $4,923.00. He testified that the amount of down payment indicated on the note, $1,500.00 was not the actual amount; that the actual amount of the down payment was $500.00. He stated that as a dealer he frequently set the price higher to show a higher down payment to make the note more acceptable to the bank. On January 7, 1957 defendant purchased two 1951 thirty-three foot Andrews refrigerated trailers again signing a conditional sales note and contract for the purchase. The note for these two trailers, which is the note upon which the plaintiff brought suit, was for a total of $9,200.00. On March 8, 1957, defendant co-signed for the purchase of the fourth trailer, a 1951 thirty-six foot Andrews refrigerated trailer, by one E. Lea whom the plaintiff testified was employed by the defendant

at the time of the purchase. Plaintiff further testified that E. Lea was not an acceptable credit risk and that therefore he asked the defendant to sign the note with him.

Plaintiff further testified that he had not agreed with the defendant that the trailers were to have been delivered before the first of the year, that to the contrary, they were individual purchases. Plaintiff's evidence and testimony indicated that the trailers were in the same condition when delivered as when they were inspected by the defendant and that the cooling unit which was missing from one of the two Andrews trailers when purchased was subsequently replaced. The Dorsey trailer, plaintiff's evidence indicated, was voluntarily relinquished by the defendant and on November 5, 1957, plaintiff entered into a lease-sale agreement with the W. T. Whittington Corporation which provided that the lessee was to pay a monthly rental on the trailer equal to the amount due under the note which had been signed by Major, and when the trailer was paid off, title would be transferred to W. T. Whittington, Inc., The balance due on this trailer was subsequently paid off in this fashion.

The thirty-six foot Andrews trailer which was signed for by the defendant and E. Lea later disappeared along with Mr. E. Lea and was never recovered. The re-

maining two thirty-three foot Andrews trailers were repossessed by the plaintiff, being returned to his lot by one of the defendant's drivers. On April 4, 1958, plaintiff and other witnesses testified that the plaintiff conducted a public sale of the two trailers after having first sent out notices of the sale. On that date one of the trailers was sold for $2,050.00 and at a later time the other was sold for $1,616.50 to the same person who had purchased the first.

Paul Woesthaus, Assistant Vice President in charge of the Loan Department of the Union National Bank was called as a witness for the plaintiff. He testified that there were three payments made on the note for the two Andrews trailers totaling eleven hundred dollars, leaving a balance of eighty-one hundred dollars due on the note and contract. He testified further that subsequently trailer number 691 was sold for $2050.00 and trailer number 692 was sold for $1616.50. This left a deficiency on the note in the amount of $4433.50. Judgment was entered by the trial court in the amount of $4876.85 which included $443.35 for attorney's fees as provided by the note. The same witness also testified as to payments being made on the 1951 Andrews trailer by Mr. E. Lea which would tend to substantiate the plaintiff's

version of the purchase of that vehicle.

The only witness testifying on behalf of the defendant were the defendant and his wife. The wife testified that she kept the books and records on her husband's business but that the only knowledge she had of these transactions was what her husband had told her.

The defendant testified that in the fall of 1956, he and Mr. Filbey agreed that he would buy the four trailers; that Filbey would have them ready for him by the first of the year because the defendant had a contract to haul meat from St. Louis to Chicago for Swift & Company at that time. He testified further that he ultimately received only three of the trailers, the Dorsey and the two thirty-three foot Andrews trailers; that there was a thirty-six foot Andrews trailer which he looked at but refused to buy without getting the title at the time of the purchase. Therefore, he stated, he did not purchase the thirty-six foot trailer. He stated further that E. Lea did not take the thirty-six foot trailer, but took one of the two thirty-three foot trailers he had, Filbey having stated that they would prepare new contracts to cover this transaction. Defendant stated that when he signed the conditional sales notes and contracts on the purchase of these trailers, they were in blank and not filled in. He stated that at the time of delivery, the

Dorsey was in good shape, but the trailer with the cooling unit missing was in poor shape and the refrigeration unit which was installed in it by the plaintiff did not work properly until he expended a large sum of money to have it repaired. He also stated that the tires on one of the two Andrews trailers were in "junk" condition and that they had been switched from the time he had first inspected the trailer. He testified that of the two Andrews trailers he received, Mr. Lea took one on an allegedly new contract and the other was taken by a Mr. Ford who was brought to his place of business by Mr. Filbey for the purpose of purchasing that trailer. The defendant further testified that he was unable to read even though he had been in business for most of his life .

Defendant contends (a) that there was a new agreement between the parties because the plaintiff agreed to resell the trailers in question to third parties and release the defendant of any further obligation if the defendant would keep the trailers until other buyers were found; (b) that the plaintiff was estopped from recovery because he induced the defendant to keep the trailers with the promise that other parties would be found to buy them; (c) that there was breach of an implied warranty of fitness; (d) that to establish a valid deficiency, a

repossession sale must actually be conducted and must be fair; (a) where the facts are not in dispute and their legal effect becomes a matter of law, the rule as to the power of the reviewing court to set aside a decision only when it is against the manifest weight of the evidence does not apply.

There was disputed evidence concerning each of the aforesaid contentions made by the defendant. Therefore, this court is bound by the rule of law that the findings of the trial court will not be disturbed on review unless they are clearly contrary to the manifest weight of the evidence. Prudential Insurance Co. v. Spain, 339 Ill App 476,483; Olin Industries v. Industrial Commission, 394 Ill 202, 2 ILP (Appeal & Error) Sec. 786.

In the instant case, the trial court, who heard the case without a jury, chose to disbelieve the defendant and believe the plaintiff. The trial judge saw and heard the witnesses and was able to determine which was the most worthy of belief. In view of the conflicting versions, the trial judge is entitled to choose the version that is most credible, and unless completely outside the scope of the evidence, his findings should not be disturbed. Hall v. Illinois National Ins. Co. , 34 Ill App 2d 167.

After a careful consideration of the record,

this court is of the opinion that the judgment of the trial court was not manifestly contrary to the weight of the evidence. Plaintiff's evidence was substantiated not only by exhibits but by testimony of other witnesses as well, concerning the original transactions, ultimate repossession and sale of the repossessed trailers.

For the foregoing reasons, the court considers it unnecessary to consider other points raised on appeal by the appellant.

The decision of the trial court is hereby affirmed.

Judgment affirmed.

CONCUR:

Edward C. Eberspacher

Joseph H. Goldenhersh

Publish abstract only.

Gen No. 64-25 (62 I.A.2d 267)

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CARL WILLIAM HOFFMAN, Defendant-Appellant.	:	APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, ILLINOIS

EBERSPACHER, P. J.

Appellant Carl William Hoffman and Eldon Eugene Keel were tried before a jury in the circuit court of Madison County on the charge of aggravated battery. Hoffman was found guilty and Keel was acquitted. The appellant's motion for acquittal or for a new trial, and his application for probation were denied and he was sentenced to the Illinois State Penitentiary for not less than one year nor more than four years.

Appellant here contends, (1) the State failed to prove, beyond a reasonable doubt, that he was not acting in self defense and that he committed all the other elements of aggravated battery when he shot and wounded Robert C. Jones,

and (2) the trial court should have granted his motion for acquittal and discharge notwithstanding the verdict of the jury, or, alternatively, his motion for a new trial.

In criminal cases it is the duty of this Court to review the evidence, and, if there is not sufficient credible evidence, if it is improbable or unsatisfactory, or not sufficient to remove all reasonable doubt of appellant's guilt and create an abiding conviction that he is guilty, the conviction will be reversed. People vs. Sheppard, 402 Ill. 347; People vs. Willson, 401 Ill. 68; People vs. Coulson, 13 Ill. 2d 290.

Appellant's uncontradicted testimony is that at about 7:15 P.M. on September 20, 1962 appellant and Keel were standing at the bar near the front of Sherry's Lounge in Granite City; Keel, who had been in Sherry's since 2:00 o'clock that afternoon drinking hard liquor, was drunk. Appellant, who was 26 years old, had been in Sherry's and had a few drinks there, during the afternoon, and left about 4:00 P.M., went home and returned to Sherry's to pick up Keel and go to Alton to get appellant's other automobile which had been repaired there. Appellant entered Sherry's in the evening with a loaded pistol in his jacket pocket intending to return it to party from whom he had previously borrowed it on the way to Alton; while seated in Sherry's, drinking beer, he loaned his car to a friend to help another party start their car and then with Keel went up to the bar.

That appellant received a call about 5:30 P.M. at his home requesting that the gun be returned and that appellant took the gun with him that evening was supported by the testimony of his wife.

The uncontradicted evidence also disclosed, that while standing at the bar with appellant, Keel became noisy and threw some glasses in the corner, breaking them; that the prosecuting witness Robert Jones, aged 24, was at the bar with Gilbert Sava, Peter Caterina and William Porter, all of whom were soldiers on duty at the Granite City Army Depot, wearing civilian clothes, that Phyllis Malwitz, aged 24, was the barmaid on duty, and that she started around the bar when Jones offered to clean up the broken glass, and took a broom and dust pan, cleaned up the glass, emptied it, and returned to the bar; that a few words passed between Jones and Keel, Jones asking Keel to be quiet, and Keel asking Jones if he could buy him a drink, which Jones declined; that Keel continued to be noisy and threw stirrers and straws on the floor, which Jones picked up; that Miss Malwitz told Keel to be quiet or she would call the police and Keel continued to be noisy, and Miss Malwitz took a dime from the register and started to the phone booth when Keel followed her to the booth.

As to what occurred immediately thereafter, there is a conflict in the testimony. Jones testified that when Miss Malwitz started for the phone booth and Keel followed he

grabbed Keel in a bear hug and appellant stuck a gun in his ribs and said "let him be", that he stepped back, and when Keel tried to kick the phone booth door, he and Keel again started scuffling, and appellant aimed the gun at Jones' head and backed him to the bar; that Sava then tried to get the gun from behind but was discovered and ordered to the bar and appellant ordered the barmaid out of the booth and after a few words to her, said to him "look here you big bastard" whereupon Jones fearing that appellant would shoot him threw a glass of cognac into appellant's face and followed through with the glass knocking appellant back and hit appellant a second time when Keel placed his hand on Jones' shoulder and Jones hit Keel, and when Jones turned around four or five shots were fired, and the weight of Keel and appellant dragged him down; that he then realized that he had been shot and Sava hit appellant with a bar stool and appellant ran from the building followed by Keel.

Sava's testimony was substantially the same as Jones' except that Jones and Keel were still scuffling when the shots were fired.

Phyllis Malwitz testifed as to the behavior of Keel and as to the scuffling between Keel and Jones; that appellant knocked on the door of the phone booth and said "get out, you might get hurt"; that she left the phone booth and got behind the bar and things seemed to have quieted down at that time; once behind the bar she heard a short scuffle and then the gun

shots. She further testified that she did not see Keel when she came out of the phone booth and did not notice where appellant went, and that she did not actually see any gun but heard four shots. After hearing the shots, she crawled over the front end of the bar, ran next door and phoned the police. As she left the tavern she saw Jones on the floor with his buddy over him.

Appellant testified that when Miss Malwitz went to the phone booth Keel apologized and told her he would leave if she would not call the police, and Jones grabbed Keel; that he then went to the booth and told the girl he was sorry about the trouble and that he and Keel would leave if she did not call the police; that when she left the booth Keel and Jones let go of each other and that he told Jones he was sorry and that they were leaving when Jones hit him on the chin with the glass, breaking it and cutting his chin and forced him down on his buttocks; that Jones was over him with the remains of the glass in his hand when he pulled the gun from his pocket and shot Jones. Appellant testified that he did not know whether Jones stumbled over his feet and fell with him, or whether Jones was deliberately coming at him; that all he knew was that Jones was over him with the broken glass in his hand, that he feared being cut again and pulled the pistol out of his pocket and fired.

After leaving the tavern appellant threw the gun away, went to Keel's home where Keel's mother washed off his face

and applied tape. He and Keel then went to East St. Louis to the home of a friend, where he changed clothes, and were driven to Alton, where he picked up the repaired car, stayed in Alton overnight and then, because he was scared, went to Peoria, returning to Granite City a day and a half later when he surrendered to the police.

Caterina, who was with Jones, Sava, and Porter in Sherry's, testified that he moved away from the disturbance and when he saw the gun he ducked; that he overheard no conversation but remained at the bar when Jones first left it, saw Jones fighting and that no shots had been fired when he last saw Jones and that upon the shots being fired he ran out the front door.

Porter had left the jurisdiction at the time of the trial did not testify.

Jones denied that he ground the glass into appellant's face but stated on cross-examination that he would have had he had the opportunity. The evidence disclosed that appellant Hoffman was five feet six inches tall and weighed 148 pounds, and that Jones was six feet two inches tall and weighed 220 pounds. Medical evidence disclosed that Jones was shot from the front three times; he had a flesh wound of the left shoulder and two chest wounds. The bullets had traveled up and through, indicating they entered his body at a level higher than that from which they were fired. Jones also received a fracture of the left fibula, which was not caused by gunshot.

All the elements of an aggravated battery are present. That defendant must be proved guilty beyond a reasonable doubt is conceded. Whether the shooting was justified under the law of self defense was a question of fact to be determined by the jury. We will not reverse the judgment of conviction on the ground that the evidence is insufficient to sustain the finding of guilty, unless there is reasonable and well-founded doubt of the guilt of the accused and the finding is palpably contrary to the weight of the evidence. People vs. Griffin, 48 Ill. App. 2d 148.

In this case the evidence becomes conflicting only for the few minutes immediately preceeding the shooting. It is uncontradicted that Keel had become intoxicated and unruly, and that Keel and Jones had been involved in physical contact and argument prior to the glass throwing incident, brought on by appellant's injecting himself into a quarrel that was not his. The physical contact with Keel was not of such nature that there was any justifiable fear of bodily harm to him. Jones had not talked to appellant nor had appellant needed to be involved. Appellant would have had the jury believe that when he tried to apologize to Jones for Keel's behavior, that Jones made an unprovoked assault upon him. The People's evidence was that Jones threw the glass, because appellant had a gun pointed at him and he was afraid of being shot. Even though appellant denied that he drew the gun or

forced Jones back to the bar there is sufficient evidence to discredit the denial. No facts or circumstances are shown that would lead the jury to believe that Jones would only scuffle and attempt to restrain the principle trouble maker by a bear hug and then viciously attack appellant when he was merely apologizing for his friend's behavior and attempting to get him to leave the premises. When the evidence is conflicting, the credibility of the witnesses and the weight of their testimony are questions for the jury. People vs. Lobb, 17 Ill 2d 287.

When at gunpoint appellant forced Jones back to the bar, in a matter in which he was not involved, he became an aggressor. The reason for appellant's having a loaded gun on his person is not important in this case, but the fact that he had it, and used it in a quarrel that was not his own, is of major importance. The fact that appellant, after the shooting, threw away the gun and fled, and whether his actions were those of one who was justified under the law in shooting were all proper questions for the jury to consider.

Where evidence relating to material facts in issue is in direct conflict and cannot be reconciled, it is the duty of the jury to determine the credibility of the witnesses and the weight to be given their testimony, and the reviewing court will not substitute its judgment for that of the court or jury. People vs. Coulson, supra; People vs. Tensley, 3 Ill 2d 615.

The requirement that appellant's guilt be proved beyond a reasonable doubt does not mean that the jury must disregard the inferences that flow normally from the evidence before it. Here not only the People's evidence, but the inferences from all the evidence pointed toward a lack of justification, and appellant's guilt. The jury was not required to search out a series of potential explanations compatible with innocence and elevate them to the status of a reasonable doubt. People vs. Russell, 17 Ill 2d 328; People vs. Owens, 23 Ill 2d 534.

After reading the record we cannot say that the jury's verdict is based upon compassion for the prosecuting witness or passion or prejudice against this appellant. The jury found there was an aggravated battery without justification and the trial judge has approved that verdict.

The judgment of the circuit court of Madison County is affirmed.

Not to be published in full.

Concur:/S/ Joseph H. Goldenhersh

Concur:/S/ C. E. Wright

49785

JUDITH ANN WEISHAAR LYTLE,
Plaintiff-Appellee,
v.
JEWEL TEA COMPANY, INC.,
Defendant-Appellant.

APPEAL FROM THE
SUPERIOR COURT OF
COOK COUNTY.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a $5,000 judgment, based upon a jury verdict, for injuries sustained when plaintiff fell in defendant's store while purchasing food, and from the order denying defendant's post-trial motion.

Plaintiff's Complaint stated that defendant had a duty to exercise ordinary care and not permit ice, snow or other similar slippery matter to accumulate and form puddles on the floor; that plaintiff was in the exercise of due care; that defendant permitted ice, snow and other slippery material to accumulate and remain on the floor of said store; that defendant by its agents and employees knew or, in the exercise of due care, should have known that plaintiff could not, and did not, have knowledge of said dangerous conditions; and that plaintiff walked on said floor and was caused to and did slip and fall, sustaining severe injuries.

Defendant filed an Answer in which it denied that it failed to perform its duty; denied that plaintiff was in the exercise of due care; denied that defendant negligently permitted ice, snow and other slippery material to accumulate and remain on the floor; and denied that the same was dangerous.

Defendant's store is located on the north side of the street at 1952 West Lawrence Avenue, Chicago, Illinois. Three or four steps inside the entrance door, the aisle makes a right angle turn. Plaintiff, a girl of 17 years of age, came into defendant's store to shop. The weather was slushy. Plaintiff was wearing pumps with three-inch heels. She was not wearing galoshes or rubbers. She entered the store and walked four or five steps and at the point where the aisle turns to the right,

slipped and fell, fracturing her elbow.

Plaintiff testified that she fell just after she entered the store. She further testified that there was a puddle of muddy water and slush at that point, and that the floor where she fell was made of wood and dipped a little bit. On cross-examination plaintiff was asked if there was anything on the floor other than the puddle of water that had accumulated. She replied, "the only thing in use was cardboard; otherwise the floor was not covered."

William Ammons, a stock boy employed by defendant, testified that in bad weather, moisture would collect at the point where the customer fell, and that in bad weather the manager would have one of the boys lay down cardboard to absorb the moisture.

Ammons was asked why moisture would collect at this point. This question was objected to by defendant's counsel. The objection was overruled by the court. The witness answered, stating, "It would only be speculation on my part. I don't know that there was an indenture in the floor." An objection to this answer was sustained by the court. The trial judge took notes of the testimony during the course of the trial. Notes relating to the testimony of Ammons were made a part of the report of proceedings for purpose of this appeal. These notes stated:

> Nov. 15, 1958--employed by Jewel at Lawrence Ave. store. Floor at entrance is wood. Enter turn right. Floor collected moisture and puddles of water in rainy weather--usually put cardboard on floor to absorb moisture--floor worn--low spot--collects water. Cross exam.

Plaintiff also introduced evidence that other stores in the neighborhood placed rubber mats inside the entrance door of their establishments to collect the slush and water that might accumulate so that the entrance of the store would remain dry.

Defendant's store did not have either cardboard or rubber mats on the floor inside the entrance door the day of the incident. There was evidence introduced that defendant's employees mopped the floor twice in

the course of one hour. It was not established however, how long, prior to the incident, the floor had been mopped.

Defendant filed motions for a directed verdict and a judgment notwithstanding the verdict or in the alternative, a motion for a new trial, all of which were denied.

Defendant's theory of the case is one, that evidence of tracked-in moisture submitted by plaintiff is not a sufficient basis to submit the question of defendant's negligence to a jury unless defendant has notice of the condition; two, that plaintiff never pleaded any defect in the arrangement of the store or in the composition or construction of the floor; and three, that plaintiff offered no proof that any of the aforesaid defects caused the incident.

Plaintiff's theory of the case is that the negligence of defendant is sufficient in law to sustain the judgment.

We agree with defendant that water tracked in by customers will not impose liability on a defendant, unless the defendant has notice of the condition. We disagree, however, with defendant's contention that the pleadings and proofs submitted by plaintiff did not establish a defect in the floor.

With respect to the pleadings we agree there were no allegations in plaintiff's pleadings that a defect in the floor existed. Any evidence introduced by plaintiff, showing a defect, would have been immaterial to the issues and subject to objection. Defendant, however, did not object. Consequently plaintiff was not put on notice to amend his Complaint. Thus, defendant, by not objecting, waived any defect in the pleadings. DeMartini v. DeMartini, 304 Ill. App. 165, 171, 26 N.E.2d 167, 170 (1940).

With respect to the proofs, plaintiff testified that "the floor is wood and old and there is a spot where you just have to turn, you have no choice, and it is just sort of--I don't know what you would call it, it dips a little bit." Defendant contends that this testimony relating to a defect in the floor was explained on cross-examination when plaintiff, in answer to the question - "And you didn't notice anything unusual about

the floor in this area that we have been talking about other than this accumulation of water?" stated "It wasn't covered as it generally was in bad weather." In response to the question "You didn't notice anything else unusual about it, did you?", plaintiff responded "No, just uncovered." We disagree with defendant's contention that plaintiff's answers on cross-examination explained or in any way contradicted her testimony on direct examination that "the floor dips a little bit."

William Ammons also testified in regard to the alleged defects in the floor. The testimony of Ammons relative to this issue is as follows:

> "Q. On or about or before November 15, 1958, in your duties as a stockboy, who mopped the floors? Did you have occasion to inspect the floor at that point?
> A. No, I never had occasion to inspect it.
>
> Q. Did you ever notice the condition of the floor at that point?
> A. I am not quite sure I understand that question. When you say, if I notice the condition.
>
> Q. Well, is there anything different at that point than any other part in the immediate area as to the surface of the floor?
> A. In bad weather, rain, and it would collect in there. Moisture would collect.
>
> Q. Could you tell us why?
>
> Mr. Miller: I will object.
>
> The Court: Overruled.
>
> The Witness: It would be speculation on my part. I don't know that there was an indenture in the floor.
>
> Mr. Miller: I will object to the speculation on the part of the witness.
>
> The Court: Sustained. What did you see?
>
> The Witness: Puddles of water would accumulate as you walk in the entrance of the door."

The trial judge in his notes, wrote down that Ammons testified that he usually put cardboard on the floor to absorb moisture and that the floor was worn, contained low spots, and collected water. This testimony did not appear in the transcript. The trial judge had the notes photostated and sent to this court for purpose of this appeal. The

transcript was approved subject to the corrected testimony of Ammons as stated in his notes.

Defendant contends that the judge's notes are not part of the record and cannot be utilized by this court in arriving at a decision. It is a basic principle, that the trial judge, in ascertaining the correctness of the transcript of proceedings, can take steps to be properly advised of the correctness of the transcript of proceedings. One of the steps that might be taken is to interrogate witnesses so that the truth of the testimony before the court may be ascertained. People v. McConnell, 155 Ill. 192 (1895). Cf. Feldman v. Munizzo, 16 Ill. App.2d 58, 147 N.E.2d 427 (1957). The lower court did this in the instant situation, and found that the transcript omitted certain testimony. The judge corrected the transcript by the use of his own notes, and it is this corrected transcript which we are asked to review on this appeal. We conclude that the testimony of Ammons relating to the defect found in the judge's notes, was properly made part of the transcript of proceedings and this evidence, together with the testimony of plaintiff, was sufficient to show that a defect existed. We hold that the motion for a judgment notwithstanding the verdict was properly refused as the evidence in the record, standing alone, and taken with all its intendments most favorable to the party resisting the motion, tended to prove the material elements of the case. Currie v. Conover, 48 Ill. App.2d, 200 N.E.2d 620 (1964).

Defendant also maintains that an instruction on its theory of the case, that it was not an insurer of plaintiff's safety, was improperly refused by the lower court. The instruction stated:

> The store keeper is not an insurer of his customers' safety; but owes the duty to use due care to keep the premises reasonably safe so that his customer will not be injured. The fact that the customers on a rainy day track in water so as to make the floor wet is not evidence of negligence of the store keeper.

We disagree with this contention. Illinois Supreme Court Rule 25-1 (a) states:

> Whenever IPI does not contain an instruction on a subject on which the Court determines that the jury should be instructed, the instruction on that subject should be simple, brief, impartial and free from argument.

Defendant's instruction is not simple since it is both negative in stating what the defendant is not and positive in stating what it has a duty to do. In the foreward of the Illinois Pattern Jury Instructions, it is stated:

> First, the Committee in general has been opposed to negative instructions, these instructions which tell the jury not to do something.

The instruction was properly refused by the trial court.

For the above reasons, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

49531

THOMAS BARRETT,

Plaintiff-Appellant,

v.

RALPH WALLENBERG and WALTER A. WODARCZIK, d/b/a KOOL RITE AUTO RADIATOR SERVICE,

Defendants-Appellees.

62 I.A.2 478

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

A

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment, based on a jury verdict, entered in favor of defendants.

Plaintiff, Thomas Barrett, was injured in an automobile accident on August 21, 1956, at the intersection of Randolph Street and Marengo Avenue, Forest Park, Illinois, when the Chevrolet sports coupe he was driving was involved in a collision with a Ford station wagon driven by defendant Ralph Wallenberg, who was an employee of defendant, Walter A. Wodarczik, d/b/a Kool Rite Auto Radiator Service.

Plaintiff related that in August of 1956, he owned and operated a 1955 Chevrolet sports coupe, which he purchased in June of 1955; that on the morning of August 21, 1956, he was on his way to work, proceeding east on Randolph Street in Forest Park, Illinois; that he came to a Refiner's Pride gas station, located on the north side of Randolph, but west of and adjacent to the first north-south alley west of Marengo (Marengo is a north-south street one block east of the gas station), where he purchased gasoline; that he "proceeded to pull out on a southeast angle towards Randolph Street"; that he stopped as he approached the north curb of Randolph; that he looked both ways; that he pulled out into Randolph Street and proceeded east at approximately 15 miles an hour; that from the time he pulled out of the gas station and turned east, until the moment of the impact with defendant's car at Marengo, his speed may have increased possibly a mile an hour at the most; that he was approximately 25 feet from the west curb line of Marengo when he looked to the right; that he observed a Ford station wagon approximately 50 feet from the south curb

line of Randolph; that his own vehicle was about 20 feet from the west curb of Marengo; and that he looked to the north, to his left and did not observe any traffic coming from the north going south. He then testified:

> I proceeded on and looked to the right and I saw this Ford coming through the stop sign. Then the Ford came in contact with my Chevrolet. The left front bumper (of the Ford) hit my door, my only door on the right side. It is a two door car....It was difficult for me to determine how fast the station wagon was traveling at the time he hit me, but he was moving at a great rate of speed.

Plaintiff further testified that at the point of impact he was thrown from the driver's seat to the center of his car and that he attempted to apply his foot brake. He stated:

> I tried to put my right foot on the brake, and the right leg was broken, it was gone. After this I tried to cover myself and I threw my left foot up to guide or to brace myself and in doing so, I hit my accelerator with my left foot....The next thing I knew we hit the tree, which stopped my car.

The tree was located about 50 feet east of Marengo.

Plaintiff stated that from the moment of impact until the time that his vehicle hit the tree about 50 feet east of Marengo, he did not lose consciousness; that when the car struck the tree, his jaw hit the radio knob and his teeth hit the dashboard; that he sailed into the right hand corner of the car; that he was on the floor when he came to a halt; and that he remained in that position for about ten minutes until the police came.

Ralph Wallenberg testified that he was employed as a pickup and delivery man in a radiator shop owned by defendant Walter A. Wodarczik, d/b/a Kool Rite Auto Radiator Service; that on August 21, 1956, on instructions of his employer, he was on his way to make a pickup at Flash Auto Body, 112 10th Avenue; that the weather was clear and bright, visibility good, and the streets dry; that he had entered Marengo at Washington Boulevard, and proceeded north on Marengo about a foot or two east of the center line; that he maintained that position continuously until he arrived at Randolph; that the highest speed attained in the block

was about 20 miles per hour; that as he approached Randolph he stopped at the stop sign with his front bumper approximately even with the sign and the sidewalk; that he stopped there a few seconds to see if any traffic was coming from either direction; that he saw three or four eastbound vehicles traveling at about 25 to 30 miles per hour; that they first came into his vision about a half a block away; that he looked to his right and could see Harlem Avenue, about two blocks away; that he did not remember seeing any westbound traffic; that he was still stopped and remained there a couple of seconds; that the eastbound vehicles cleared the Marengo-Randolph intersection; that he pulled up to the curb and stopped again; that his auto was then a foot or two east of the center of Marengo; that he was there about a second or two; that he saw nothing coming from his left or his right; that from the time he traveled the 20 feet from the stop sign to the curb, he saw no more traffic; that he traveled the 20 feet at about two miles an hour; that after his second stop, he started to pull out to make a left turn at Randolph; and that he pulled out at a "slow rate" into the intersection.

He further testified that after he got into the intersection he saw a car coming from the west; that he didn't know where it came from; that it was about 50 feet away from him when he first saw it; that the other car was traveling at a fast rate; that when he first saw the car he had a clear view to the west on Randolph; that his own car, preparing to turn left on Randolph, was at a slight angle to the west; that when he first saw the other car, his Ford was about two feet south of the Randolph center line; that there was an impact at about the instant he applied his brakes; that after he hit his brakes he traveled about one or two feet; that the eastbound vehicle continued to come east; that the left front bumper guard of his Ford came in contact with the right front bumper and the whole side of the Chevrolet; that immediately after the impact, the Chevrolet swerved to the left "a little bit"; that defendant's vehicle did not swerve in any direction; and that his Ford

was damaged from the left front bumper to the right fender.

Howard Selzer testified on behalf of defendants that he was traveling westbound on Randolph Street east of Marengo; that plaintiff's automobile did not appear to decrease speed up to the time of impact with the tree; and that defendant Wallenberg went more than 1/2 way into the outer lane.

The jury rendered a verdict of not guilty in favor of defendants upon which judgment was entered. Plaintiff's post trial motion was denied.

Plaintiff's first allegation of error is that the trial court permitted defendant's counsel to cross-examine plaintiff repetitiously while restricting plaintiff's counsel on cross-examination of defendant. Defendant's counsel was permitted to ask plaintiff several times whether or not plaintiff's statement, that his left leg hit the accelerator causing the car to pick up speed, should have been given in plaintiff's discovery deposition. We agree with defendant's position that the cross-examination of plaintiff was within the rule of evidence permitting a party to be discredited by the failure to state a fact when it is incumbent to state such a fact, if it is true. Carroll v. Krause, 295 Ill. App. 552, 561, 15 N.E.2d 323 (1938). Furthermore, the amount of repetition allowed by a trial court is within its sound discretion. Buck v. Maddock, 67 Ill. App. 466 (1896) affmd., 167 Ill. 219, 47 N.E. 208 (1897).

Plaintiff's next allegation of error is that the trial court permitted improper inquiry of prior accidents not connected with the instant case. Plaintiff testified on direct examination that he had previously injured his right shoulder playing football in 1947. Defendant's counsel inquired on cross-examination whether or not plaintiff had been in an automobile accident after he received the football injury. Plaintiff testified that he was in an accident in August of 1956 in which his automobile was hit in the rear end by a Greyhound bus. Plaintiff also testified that he was in an accident in February of 1956 caused by

a blow out which resulted in his automobile hitting a tree.

A party can inquire into a prior similar occurrence, if the inquiry is conducted in good faith, either for the purpose of impeaching a witness in the event of a denial or to prove other relevant information. Plaintiff contends that no impeachment took place and that any injuries incurred in the prior accidents were not relevant to the instant case. We agree with plaintiff that the trial court erred in allowing an inquiry into the prior accidents, without connecting them up to the injuries sustained in the instant case. Marut v. Costello, 53 Ill. App.2d 340, 344, 345, 202 N.E.2d 853 (1964), appeal pending, Supreme Court No. 39144, May, 1965. We hold, however, that the error was not prejudicial.

Plaintiff's next allegation of error is that the trial court did not allow plaintiff's counsel to examine a pre-trial statement of witness Selzer. Selzer gave a pre-trial statement to defendant a few days after the accident. This statement was held in the hands of defendant's counsel while Selzer was being examined. On cross-examination plaintiff's counsel requested the use of the pre-trial statement which was denied on the ground it was the work product of defendant and that it was not being used to refresh his recollection. We agree with the trial court. Plaintiff's demand for the use of the pre-trial statement of the accident was properly denied in that there is sufficient evidence that the witness testified from his own memory. People ex rel. Morgan v. Muliken, 40 Ill. App.2d 282, 292, 190 N.E.2d 502 (1963).

Plaintiff's next allegation of error is that the trial court allowed defendant's counsel to make improper and prejudicial remarks and ask improper questions in the presence of the jury. It could be inferred from the remarks of defendant's counsel that plaintiff's counsel had coached plaintiff prior to taking the stand. The fact that a witness has talked to his attorney, however, may be brought out during the course of a trial. The jury has a right to consider that information in deciding

the weight to be given the testimony of the witness. Plaintiff also maintains that defendant repeatedly propounded questions to the witnesses in the form of statements. It was brought out, however, by defendant's counsel, that plaintiff was also guilty of propounding questions in the form of statements. One party cannot assert as error that opposing counsel propounded statements in the guise of questions where his own attorney also made such statements. Chapin v. Foege, 296 Ill. App. 96, 109, 110, 15 N.E.2d 943 (1938).

Plaintiff's next allegation of error is that the trial court excluded certain testimony on re-direct examination of a police officer. Counsel for plaintiff showed a photograph to the officer, taken after the accident, and asked the officer if he could see any skid marks. An objection to this question was sustained. We agree with defendant that the action of the trial court was proper. Mortvedt v. Western Austin Co., 320 Ill. App. 337, 50 N.E.2d 764 (1943) (abst.), and Button v. Meyer, 345 Ill. App. 84, 101 N.E.2d 626 (1951) (abst.).

Plaintiff's last allegation of error is that the trial court ridiculed counsel in the presence of the jury. Plaintiff's counsel asked plaintiff if his vehicle had left any skid marks on the street. The court sustained an objection to this question and stated that inasmuch as plaintiff was on a stretcher he was in no position to know if his car had left any skid marks. The court further stated "Let's not be ridiculous about it counsel." The propounding of such an improper question might merit such a remark from the court. Katsinas v. Colgate-Palmolive-Peet Co., 299 Ill. App. 347, 350, 20 N.E.2d 127, 128 (1939). Further, the question was not preserved for review. Public Service Co. v. Leatherbee, 311 Ill. 505, 508, 143 N.E. 97 (1924). Cf. Redwood Sprinkler v. Phillips Co., 265 Ill. App. 286 (1932).

We hold that the allegations of error raised by plaintiff, taken cumulatively, are not sufficient to reverse the judgment rendered by the lower court. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

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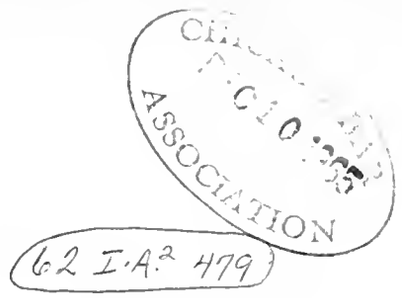
ABST.



62 I.A.2 479

MAURICE J. SHEROW,

Plaintiff-Appellant,

v.

MAURICE L. HIRSCH, JOSEPH HIRSCH and SIDNEY HIRSCH, as Trustees under the Last Will and Testament of Harry Hirsch, Deceased, and JOSEPH HIRSCH and MAURICE L. HIRSCH, individually, RUSHBA CORPORATION, an Illinois corporation, and LIVE STOCK NATIONAL BANK OF CHICAGO, as Trustee under Trust Numbers 12280, 12281, 12284, 12296, 12297, 12328 and 12920,

Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE LYONS DELIVEREL THE OPINION OF THE COURT:

This is an appeal by plaintiff from dismissal of his suit for the specific performance of a written real estate exchange contract.

On March 31, 1957, plaintiff, Maurice J. Sherow, and defendants, Maurice L. Hirsch, Joseph G. Hirsch, and Sidney Hirsch, as trustees under the Last Will and Testament of Harry Hirsch, and Maurice L. Hirsch and Joseph G. Hirsch, as individuals, and Rushba Corporation, an Illinois corporation, entered into a contract to exchange real estate, the subject matter of this suit. In addition to the exchange, plaintiff was to pay defendant trustees the sum of $13,339.81.

The parcels of real estate were held in land trusts with The Live Stock National Bank of Chicago as Trustee. Each of the parties had a partial interest in some or all of the parcels. An examination of the contract reveals that its purpose was to eliminate partial interests and place ownership of each parcel in one person. The contract recites that the parties warrant that they are the owners of fractional interests in the properties involved, as set out in a schedule attached to the contract, marked "A." This schedule contains a list of eight parcels of real estate in five land trusts in the Live Stock National Bank of Chicago. The properties are described by street address and trust

numbers. The dates of the trusts are mentioned.

The contract then states that the parties desire to exchange their partial interests so as to result in holdings as shown on a second schedule, marked "B." After the exchanges, plaintiff was to be the owner of four parcels, Joseph G. Hirsch, the owner of one parcel, and Maurice L. Hirsch and Rushba Corporation, the owner of three parcels.

A third schedule, marked "C" or "C-1" sets out the agreed prices at which the properties were to be traded.

A fourth schedule, marked "C-2," consists of a proration statement carrying over the agreed exchange valuations from Schedule C-1 and showing the net valuations of the property involved after making deductions for mortgage balances, taxes and other items of proration.

On the signing of the contract, the parties exchanged possession, management and control of the parcels of real estate. Since April 1, 1957, the only thing left for the parties to do was to deliver deeds to complete the closing under the contract. Plaintiff made repeated demands for delivery of the deeds, and defendants refused to perform. Plaintiff finally commenced this action for specific performance of the contract.

In the pleadings filed by defendants, and on the hearings before the Master, defendants interposed numerous defenses. Some of these defenses were that the contract was no longer in force because plaintiff was guilty of unreasonable delay; that plaintiff had not complied with the requirement of furnishing good title; that plaintiff had not made a proper tender of money due from him; that plaintiff had imposed conditions on the closing of the deal which he was not entitled to demand; and that the contract was not signed by an authorized agent of Rushba Corporation. All of these defenses were overruled by the Master in favor of plaintiff. Since defendants did not object to the Master's action, we shall not discuss these points further.

Other defenses raised by defendants were that the contract did not comply with the Statute of Frauds and/or contained a patent ambiguity. In support of these defenses they pointed out in their pleadings that the property involved was not described adequately in that the schedules listing the property showed the various parcels of real estate by street number and name of street, but did not show in which city, county or state the property was located and did not state any legal description. The Master also found in favor of plaintiff as to this defense, insofar as it applied to the various parcels of real estate shown on Schedules A, B and C. He found that the eight parcels of real estate on these schedules were adequately described because the schedules also identified the properties by reference to designated land trusts bearing specific numbers and dates of trust at The Live Stock National Bank. The Master found, however, that two parcels of real estate, not part of Schedules A, B and C, were inadequately described and did not comply with the Statute of Frauds. These two additional parcels appear in only one place in the contract, and that is on the proration schedule, marked "C-2," where they are referred to as "Arlington" and "Spaulding." This reference is expanded on the supporting sheets to "543 Arlington" and "4720 Spaulding." No further designation is made of them and the contract nowhere else refers to them.

The property at 543 Arlington Place, Chicago, Illinois, is held in trust with The Livestock National Bank of Chicago, Trustee under Trust No. 12328. The beneficiaries of this trust are Morris Rich and Ida Rich, 50%; Maurice L. Hirsch and Ruth Hirsch, 33-1/3%; and Maurice L. Hirsch, Joseph G. Hirsch and Sidney H. Hirsch, as Trustees under the last will of Harry Hirsch, 16-2/3%. After the suit at bar was filed, the 16-2/3% interest of the Trustees was conveyed to Morris Rich and Ida Rich.

The property at 4720 North Spaulding Avenue, Chicago, Illinois, is held in trust with The Live Stock National Bank of Chicago, Trustee under Trust No. 12296. The beneficiaries under this trust are Rushba

Corporation, 50%; Joseph G. Hirsch 25%; and Maurice L. Hirsch, Joseph G. Hirsch and Sidney H. Hirsch, as Trustees under the last will of Harry Hirsch, 25%.

The Master decided that because Arlington and Spaulding were mentioned in the proration schedule, plaintiff was not entitled to specific performance of the exchange agreement covering the eight parcels. He based his decision primarily on the following conclusions:

> 8. The acquisition of interests in the properties listed in Schedule A involves transfer of interests in the 'Arlington' and 'Spaulding' properties. While the proposed distribution of settlement balances (Schedule C-2) indicates credit balances as to the 'Arlington' property in M. Hirsch, H. Hirsch and M. Rich, and as to the 'Spaulding' property in Rushba Corporation, J. Hirsch and H. Hirsch, and while the distribution of real estate (Schedule C-2) shows dollar credit in the 'Arlington' property in Rushba Corporation, J. Hirsch, H. Hirsch and M. Rich, and in the 'Spaulding' property in H. Hirsch only, this court is asked to decree specific performance in favor of the plaintiff without the 'Arlington' and 'Spaulding' properties having been made the subject of the exchange agreement and without the identification in that agreement of these properties sufficient to point out those properties with any degree of certainty.
>
> > (A) Paragraph 2 of the agreement provides that each party agrees that he will exchange his respective fractional interests, as aforesaid (referring to Schedule A), for other fractional interests of the other parties thereto, in accordance with Schedule C attached. Schedule C, as that designation was written on the typewriter, became Schedule C-1 by the addition of the figure '1' in ink, and Schedule C-1 does not refer to any 'Arlington' or 'Spaulding' properties.
>
> 9. This Court cannot be required to determine the names of the owners of the beneficial interests in the 'Arlington' and 'Spaulding' properties by arithmetic calculation from a settlement sheet. From the face of the agreement here involved, it does not appear which of the defendants, if any, holds beneficial interests in the 'Arlington' or 'Spaulding' properties. Settlement entries are not evidence of ownership. The description of these two properties, even though settlement sheets show streets and street numbers, because no city or village is mentioned, are so uncertain as to require parol evidence to locate the properties, and as these ambiguities appear on the face of the writing itself, the uncertainty in the descriptions cannot be cured by extrinsic evidence.

10. While no city or village is mentioned as to the properties listed on Schedule A, there is a listing of trust numbers and a reference to the trustee, The Live Stock National Bank of Chicago, in paragraph 9 (a) of the exchange agreement, and this furnishes a means of identifying the properties with certainty. But with reference to the 'Arlington' and 'Spaulding' properties, the agreement does not list any trust numbers or the name of the trustee. It is true that an amendment to the complaint attempts to supply this information, but that is extrinsic to the agreement and cannot cure the agreement.

11. This Court cannot decree specific performance in favor of plaintiff without decreeing specific performance between defendants inter sese since it is obvious from the agreement that the trustees were to receive property interests in exchange for the interests given up in 6 of the 8 properties listed on Schedule A. However, the exchange agreement does not on its face describe with sufficient certainty the property or properties to be received by the trustee or from whom.

12. Since it is necessary that this Court decree complete performance of the exchange agreement, both between plaintiff and the defendants, and between defendants inter sese, and since this Court cannot from the face of the exchange agreement determine which defendant or defendants specifically shall convey specific interests in property of specific description, plaintiff must fail in his action to compel specific performance.

Plaintiff filed objections to the findings and conclusions of the Master.

Plaintiff's theory is that the exchange contract is a complete, valid and enforceable contract without including the Arlington and Spaulding properties and is capable of specific performance. We agree with plaintiff. It was the intent of plaintiff and defendants not to include the Arlington and Spaulding properties in the exchange. The Arlington and Spaulding properties are not listed in Schedules "A," "B" and "C." The only reference to them occurs in Schedule C-2. Schedule C-2 is not a necessary part of the basic contract as it is a schedule of proration. Customarily, prorations result from computations apart from any written agreement and need not be attached to the contract. Yet in the instant situation the proration schedule was attached to the contract and furnishes the one and only reference to Arlington and Spaulding. We hold that reference to these two properties has no bearing on the exchange contract.

A further examination of Schedule C-2 reveals that the prorations on the exchange deal are not altered or in any way affected by the listing of Arlington and Spaulding. It shows the computations in connection with the exchanges agreed upon in the contract. It starts with the valuations for exchange purposes established by Schedule C, deducts in each case the mortgage indebtedness, then deducts the net prorations of rents, taxes and other usual items and arrives at the credit settlement balance for each party in each piece of property. It also shows the total net equity which plaintiff had in the eight parcels of real estate listed on Schedule A. In accordance with the exchange agreement, he surrendered equities in four of the eight properties: Bernard, Yates, Blackstone and Eastwood. In exchange for the surrender of his interests in these four properties, he received equities from the defendants in the other four properties: State, Sheridan, Monroe and 39th-Prairie, as set out in Schedule B. On the consummation of the exchanges, he had the same dollar equity in the properties as he had had before the exchanges, (except for $13,339.81, needed to balance the equities which plaintiff has agreed to pay), but this equity was concentrated in four properties rather than in the eight. He had no interest in Arlington and Spaulding before the trade and he acquired no interest in them as a result of the trade. He did not convey any of his property in consideration of any part of Arlington or Spaulding. The valuations placed on them did not increase or decrease his liability under the contract.

Furthermore, the Master made a number of findings bearing on this proration schedule. He stated in his report: ". . . Schedule C-2 is a settlement sheet." He specifically found that: "Settlement entries are not evidence of ownership." He also found that:

> (a) Paragraph 2 of the agreement provides that each party agrees that he will exchange his respective fractional interests, as aforesaid, (referring to Schedule A) for other fractional interests of the other parties thereto, in accordance with Schedule C attached. Schedule C, as that designation was written on the typewriter, became Schedule C-1 . . . and Schedule C-1 does not refer to any 'Arlington' or 'Spaulding' properties.

Defendants did not file any objections to these findings and they therefore stand unchallenged.

Furthermore, after the contract had been executed, the parties engaged in various activities which clearly show what properties they meant as the subject matter of the contract. One example of this appears in the negotiations preliminary to the creation of an escrow during the summer of 1958. The closing of the deal had been delayed by defendants who at the same time were asking for a deposit by plaintiff of the $13,339.81 proration item which would be due from him on the closing of the deal. A proposal was made that this sum of money be put into a special escrow, together with deeds of conveyance and other documents, so that the deal could be consummated through such an escrow at a later time. Sidney Hirsch, one of the defendants, submitted an escrow agreement. In this escrow agreement Arlington and Spaulding were not mentioned, no statement was made as to their ownership, no deposit of deeds was called for as to these two parcels, and no provision made for title reports on these properties. The deal in escrow, as outlined by defendants themselves, contemplated only the eight parcels which are the subject matter of the exchange contract.

Defendants again demonstrated that they did not consider the two parcels as part of the exchange contract. Another proposed escrow agreement was prepared by the lawyer representing plaintiff and was plaintiff's revision of the escrow prepared by Sidney Hirsch. As in the version submitted by Hirsch, there was a listing of the eight parcels of real estate under the exchange contract, but Arlington and Spaulding were not mentioned. This escrow agreement was unacceptable to the Hirsches on unrelated grounds; however, no objection was made that Arlington and Spaulding were omitted.

Subsequently, a third escrow agreement was prepared by the attorney for The Live Stock National Bank, the proposed escrowee. This agreement also listed the five land trusts and the eight parcels of real

estate covered by the contract. Again no reference to Arlington and Spaulding appeared. This escrow agreement was acceptable to both plaintiff and defendants, but this took place more than a year after the contract was signed. If Arlington and Spaulding were part of the deal, or intended to be, one party or the other would have included them in the proposed escrow agreement. If there had been an unintentional omission of them by either party, this would have been objected to at once.

Defendants say the escrow agreements were admitted into evidence only to show negotiations. We disagree and conclude that they show that Arlington and Spaulding were not intended to be included in the exchange contract.

In still another instance defendants showed that they did not consider Arlington and Spaulding as part of the exchange contract. This occurred in a proceeding entitled Ida Rich v. Bernard Rich, et al., Superior Court case No. 57 S 7345. This was an action filed in May, 1957 by Ida Rich, an heir in the estate of Harry Hirsch, seeking a construction of the decedent's will. The Hirsches, as Trustees under the will of Harry Hirsch, were made parties defendant. In January, 1958, the Trustees filed a counterclaim setting out the exchange contract involved in the suit at bar, including the schedules attached to it, asking for a determination by the court as to their authority to enter into the exchange contract. Pending a determination of this counterclaim, plaintiff obtained an order in the instant case, restraining defendants from disposing of their respective interests in the real estate. The Trustees desired to appeal from the entry of such restraining order and filed a petition in the Rich suit seeking the guidance of the court. Said petition set forth that in their counterclaim, the Trustees had presented the exchange contract involved in the case at bar; that under the contract, the Trustees would receive 100% ownership in the Spaulding Building and an interest in the Arlington Building; and that an injunction order had been entered in the case at bar, restraining them from selling the Arlington property. Paragraph 9

of the petition stated that the Trustees had conferred with their attorney and had been advised that the trial court in the case at bar had no jurisdiction to enter the injunction order. It further stated:

> . . . for the reason that in the exchanges set forth in the agreement, Maurice J. Sherow does not have any interest in either the Arlington building or the Spaulding building.

Subsequently plaintiff filed a petition to intervene in the Rich suit. Defendant claimed that he had an interest in that controversy. The lower court held in favor of defendants. However, this ruling was reversed on appeal. Thus the actions of defendants on different occasions show that they did not intend to include Arlington and Spaulding in the contract.

Defendants next contend that the exchange contract would be incomplete if Arlington and Spaulding are not included as the consideration to be given the estate of Harry Hirsch. Defendant reasons that the estate would receive nothing for the two interests in the properties which were to be conveyed to plaintiff and the five interests in other parcels of property which were to be conveyed under the exchange agreement. In support of their contention defendants point out that paragraph 2 of the contract states:

> Each of the parties hereto respectively agrees that he will exchange his respective fractional interests as aforesaid, for other fractional interests of the other parties hereto, in accordance with Schedule C attached and made a part hereto, and that he will pay such additional sums of money, plus or minus any net prorations as provided herein, as may be necessary to effect and equalize such exchange or exchanges in accordance with Schedule C-1 and C-2 (Emphasis supplied).

At the outset the above reference to Schedule C-2 does not mean that Arlington and Spaulding were to become part of the exchange contract, but only that prorations were to be made in accordance with the figures found on that schedule.

In answer to defendants' contention, the consideration need not flow from the plaintiff to the Trustees. Once it is apparent that the Trustees have received consideration for the surrender of their property, then the Sherow contract is binding. It is no objection that the

consideration does not flow directly from plaintiff. By the terms of the agreement, The Trustees surrendered all their interests in face of the eight exchange properties, some going to plaintiff and some going to the Hirsches as individuals. In consideration, plaintiff surrendered to the Hirsches as individuals, property of a value equal to the property he received from the Hirsches, both as Trustees and as individuals. By this exchange, the Hirsches, as individuals, got the benefit of conveyances of property by themselves as Trustees, for themselves as individuals. The Trustees directed plaintiff to accept certain property interests and plaintiff paid for them by conveying exchange properties to the Hirsches, as individuals. The consideration for the property received by plaintiff from the Trustees was the benefit conferred on the Hirsch individuals. Upon his fulfillment of the obligations of the contract, there was full consideration paid to the Trustees, even though no exchange property went directly to them. The benefit conferred by plaintiff on the Hirsches at the direction of the Trustees was ample consideration for the Trustees' conveyance of the decedent's property.

The governing rule of law is stated in Illinois Law and Practice, Vol. 12, Sec. 92 on Contracts, as follows:

> A benefit to a third person constitutes a sufficient consideration for a promise or agreement, and under this rule one receiving consideration from another for a promise for the benefit of a third person is liable on the promise to such third person although the latter furnishes no consideration. As stated in several cases, 'privity or consideration between a promisor and a third person, who is a beneficiary, need not exist to support the promise, provided there is a valuable consideration for the promise as between the principal parties to the undertaking.'

This rule was applied by the courts of Illinois in a recent case, Riddle v. LaSalle National Bank, 34 Ill. App.2d 116, 180 N.E.2d 719 (1962). There a loan was made to the Second Timothy Missionary Baptist Church, and as security for the note, a mortgage was given by James M. Stone, who was the pastor of the church. The mortgage was on the home property of James M. Stone and his wife, Mary. The loan not being paid, foreclosure

was started on the property of the Stones. The defense was lack of consideration moving to the Stones. The court overruled such defense, stating on page 119:

> . . . a mortgage may be given to guarantee the debt of another, and if he or the mortgagor benefits thereby there is sufficient consideration for the mortgage. 59 CJS Mortgages, sec. 90. The consideration for a mortgage need not move directly from the mortgagee to the mortgagor. The consideration may consist in a loan to a third person. If, at the mortgagor's request, any detriment, loss or damage is sustained by the mortgagee or if any advantage, profit or benefit is conferred on or accrues to the mortgagor, there is sufficient consideration to support the mortgage. II Jones, Mortgages, 8th ed., sec. 751; 36 Am. Jur., Mortgages, sec. 61; I Reeve, Illinois Mortgages and Foreclosure, sec 127....

Finally, defendant points out that plaintiff's contention that Spaulding and Arlington are not part of the contract is inconsistent in that plaintiff considered it necessary to file an amendment to his complaint in order to include Arlington and Spaulding. It is plaintiff's position that the above properties are also capable of specific performance. This is the reason why the complaint was amended to include them. We do not, however, have to decide whether or not the Arlington and Spaulding properties are capable of specific performance in this decision.

Furthermore, defendants themselves state that a perusal of the contract shows that there is no indication as to who owns what percentage of two parcels of realty known only as Arlington and Spaulding, what interests in these properties were to be transferred or to whom they were to be transferred. Thus, at one and the same time defendants claim that the contract includes Arlington and Spaulding and further that the properties are not described, the ownerships are not set out, no buyer, seller, or agreed price is shown. We can only conclude that the contract never included these two properties. For the above reasons the decree is reversed, and the cause remanded with directions to enter a decree for specific performance of the contract of March 31, 1957, directing the

exchange of deeds between plaintiff and defendants, and the payment of the sum of $13,339.81, by plaintiff to defendants.

DECREE REVERSED, CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J., and BRYANT, J., concur.

50089

62 I.A.2480

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
DONALD HARVEY,
Defendant-Appellant.

WRIT OF ERROR
TO THE CRIMINAL COURT
OF COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a judgment entered after a bench trial in the Criminal Court of Cook County, Illinois on April 3, 1963 finding the appellant guilty of armed robbery. Appellant was sentenced to three to five years in the Illinois State Penitentiary. The appellant's theory of the case on this appeal is that the evidence did not establish his guilt beyond a reasonable doubt.

The evidence shows that on February 7, 1963 the complaining witness, Herman Lee Byrd, was in the company of Pete Cummings, known as "Fast." "Fast" is the brother-in-law of the appellant, Donald Harvey. Byrd said that he had been drinking that evening and that he met "Fast" at a tavern at 63rd and Drexel whereupon they each had another drink and then purchased a pint of gin for the two of them. "Fast" then suggested that the two of them go to an apartment building at 6333 S. Drexel Boulevard. This was the apartment building in which the appellant lived. The record does not say whether "Fast" also lived in this building. Byrd testified that "Fast" had asked him if he wanted change for $20.00. Byrd said he did and gave "Fast" a $20.00 bill. According to Byrd, "Fast" kept the money and would not give him his change. A fight on the third floor landing ensued during which, according to Byrd, "Fast" threw him over the third floor bannister alongside the stairway and held him there by the lapels of his overcoat and sport coat.

Byrd testified that at this point the appellant, Donald Harvey, came from his apartment with a knife in his hand, and that "Fast" said to the appellant, "Let's get him." Byrd testified that the appellant

came down the stairs and took another $20.00 out of his pocket. At this point, Byrd said, he slipped out of his coat and fell to a landing below. "Fast" and the appellant then went into the appellant's apartment with the money and his two coats, according to Byrd.

Byrd went downstairs and called the police. When they arrived they went up to the appellant's apartment with Byrd and the janitor of the building. No one answered the door, and the janitor let the police in by removing a board placed in the door to cover a hole where glass had originally been. The hole was large enough for the men to walk through it into the apartment. One of the policemen, Joseph Thomas, testified that when they entered the apartment, no one was visible, but that after a moment, Mrs. Harvey came out from a closet. The police then searched the apartment and found the appellant hiding under a bed. A knife was found in a dresser drawer in the room in which the appellant was hiding.

The appellant and his wife were the witnesses for the defense. They testified that they heard a commotion when Byrd and "Fast" began fighting on the landing. Mrs. Harvey said she went out and saw the two men fighting and then returned to summon her husband. The appellant went out into the hall for a moment and stopped the fighting and then returned to his apartment. Shortly thereafter there was more noise outside the door and both the appellant and his wife returned to find "Fast" holding Byrd, suspended by his coat, over the third floor bannister. According to these witnesses, the appellant did not come to the aid of either party and returned to his apartment with his wife. The complaining witness said that the first time the appellant appeared on the scene was the time he took $20.00 from him at knife-point. He insisted that this was the only time the appellant came out from his apartment.

The appellant argues, "The record clearly shows that Byrd and Fast were drinking prior to the alleged armed robbery, that they began to argue and subsequently to fight, and that Byrd stated that Fast took

Twenty Dollars of his. Certainly, with this type of background the uncorroborated and contradicted testimony of Byrd does not appear to be credible, probable or satisfactory." The appellant's brief also points out that neither the money nor the coats which the complaining witness was wearing were ever recovered. Apparently "Fast" has not been seen since the night in question. It is maintained that the fact that none of the proceeds of the robbery were ever found in the appellant's possession is probative of the fact that he did not take part in the robbery. It is said that the only incriminating evidence found in the apartment was a butcher knife and that the presence of a knife in an apartment is not of itself incriminating.

The People point to the fact that the appellant was hiding under the bed when found by the police as indicating guilt. They also stress that the knife was found in a dresser drawer in the room in which appellant was hiding and was, therefore, more suspicious than the average kitchen knife.

The testimony of the complaining witness and that of the appellant and his wife are clearly irreconcilable. It is the law in this State that the positive testimony of one credible witness is enough to convict, even though the testimony is contradicted by the accused. People v. Crenshaw, et al., 15 Ill.2d 458, 155 N.E.2d 599 (1959), People v. Soldat, 32 Ill.2d 478, 207 N.E.2d 449 (1965). We hold that there is nothing so inherently improbable in the testimony of the complaining witness as to require us to set aside the finding of the trier of fact. As was said in Crenshaw, supra,

> "A jury having been waived, it was the province of the trial court to determine the weight and credibility of the testimony, to resolve the conflicts therein, and to make its findings of guilt or innocence. In view of the opportunities of observation enjoyed by the trial court, its judgment should not be set aside by this court unless the proof is so unsatisfactory or implausible as to justify a reasonable doubt as to a defendant's guilt. [citations omitted]"

To the same effect see People v. Clark, 30 Ill.2d 216, 195 N.E.2d 631 (1964).

In our opinion, the testimony of the complaining witness was not of such a character so as to be unworthy of belief as a matter of law. The judgment of the Criminal Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

50012

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	
v.	)	CRIMINAL DIVISION
	)	
WILLIAM HICKOCK,	)	COOK COUNTY
	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was convicted of robbery at a bench trial and sentenced to one to ten years in the penitentiary. He appeals.

Shortly after 10:30 P.M. on October 3, 1963, Demetra Lattos was returning home from her job as a waitress in a snack shop in Berwyn, Illinois. She was walking in an easterly direction from Harlem Avenue on 32nd Street and noticed a man approaching from the west. As the two passed, the man grabbed Miss Lattos' purse, hit her and said, "I have got a knife. Give me that purse." The assault occurred at the alley between Maple and Wisconsin Avenues, immediately below a large fluorescent street light. Miss Lattos was screaming during the incident. The assailant took the purse and ran northward into the alley. Two plainclothes detectives arrived at the scene a few minutes later, and the assailant was described as wearing a black waist-length jacket, dark trousers, a white T-shirt and no hat. Miss Lattos entered the officers' automobile and a search was made of the area. In response to a radio dispatch a short while later they proceeded to a gasoline service station at 26th Street and Harlem Avenue, a short distance from where the assault had occurred. Defendant was in the custody of two uniformed police officers who had stopped him for questioning in connection with the robbery. Miss Lattos did not at that time identify defendant as the assailant. The detectives and Miss Lattos then proceeded elsewhere in response to another radio dispatch and later returned to the service station at 26th Street and Harlem Avenue. Miss Lattos was asked if defendant was the assailant, and she

stated that he strongly resembled him, but that defendant's hair was too neat and his jacket was lighter than that worn by the assailant. Defendant, who was wearing a reversible jacket, was made to reverse his jacket to the dark side; his hair was messed and he was told to repeat the words spoken by the assailant during the assault. Miss Lattos immediately identified defendant as the assailant. Defendant was searched and $27.00 recovered from his person, the exact amount in Miss Lattos' purse when it was stolen; the denominations of the bills were also identical to the denominations of the bills in the purse.

Eugene Spolar, who resided at 3105 Maple Avenue in Berwyn, testified that about 11:00 P.M. on the night in question he heard woman's screams coming from the vicinity of the alley between Maple and Wisconsin Avenues at 32nd Street. He went into his back yard and heard someone running northward on Wisconsin Avenue. The running slowed to a walk and the witness saw a man walking northward wearing a dark jacket. When the man reached the corner of 31st Street and Wisconsin Avenue, he turned and proceeded westward on 31st Street. At the same time Mr. Spolar went to the 31st Street end of the alley in an effort to see who the man was. The man walked to within 50 feet of the witness, turned around and proceeded easterly on 31st Street toward a local park. At this point Mr. Spolar got his automobile and circled the park. A short time later he saw the same man emerge from the park combing his hair and reversing his jacket from the dark side to the light side; the man walked west toward Harlem Avenue. Mr. Spolar located and informed the detectives who were with Miss Lattos of what he saw and gave a description of the man. He later identified defendant as the man he had seen entering and emerging from the park. The witness testified that he could not remember whether defendant was carrying anything when he entered the park, but that he definitely was not when he emerged. The purse was later found without the money upon a search of the park.

Two of the four police officers involved in the investigation of the assault and the arrest of defendant testified for the State. Their testimony substantially corroborated that given by Miss Lattos and Mr. Spolar. In addition, one of the officers stated that he and his partner stopped defendant for questioning because defendant fitted the description of the assailant which they had received by radio. Defendant was stopped at 26th Street about 11:10 P.M. while walking north on Harlem Avenue.

Defendant testified in his own behalf. He stated that he left work about 10:00 P.M. and stopped for something to eat. He was on his way to 22nd Street for a taxi cab when he was stopped by the police. Defendant stated he had $32.94 on his person at the time he was arrested, which was denied by the police officer who searched him. Defendant attempted to account for the $32.94 by saying that he received $10 pay and a $20 loan from his employer, and had arrived at work that day with just over $4 in his pocket. The $10 pay and the $20 loan were corroborated by his employer, who testified for defendant. Both defendant and his employer had past criminal records.

Rita Bernklau, a waitress and co-worker of Miss Lattos and a friend of a friend of defendant, testified that she overheard Miss Lattos say she was uncertain of the identity of the assailant. The witness stated she did not hear the entire conversation because she was busy waiting on customers. In rebuttal, Miss Lattos said that she could not remember having made such a statement at any time.

Defendant maintains that the testimony given by Miss Lattos and Mr. Spolar is not worthy of belief, for the reason that Miss Lattos' testimony is equivocal as to her certainty of the assailant's identity and for the further reason that she substantially misstated defendant's age in her description to the police and had failed to identify defendant as the assailant when she was at the service station the first time. Defendant claims that the testimony of Mr. Spolar is valueless

for the reason that he was an amateur in criminal investigation.

While it is true, as defendant suggests, that the reviewing court will examine the evidence in a criminal case and will reverse the conviction if it is so unreasonable and unsatisfactory as to raise a reasonable doubt as to the defendant's guilt, the finding of the trier of fact as to credibility of the witnesses is entitled to great weight. People v. Dawson, 22 Ill.2d 260,264. The record in the case at bar does not indicate that the trial judge was in error in believing the State's witnesses and disbelieving the defendant's witnesses.

The instances characterized by defendant as "equivocal testimony" on the part of Miss Lattos are no more than direct answers given to direct questions. She was asked whether she had ever told anyone she was uncertain of the assailant's identity, to which she answered that she did not believe so and that she could not remember ever having made such a statement. None of the questions went to whether Miss Lattos ever in fact entertained an uncertainty as to the assailant's identity. On the contrary, Miss Lattos stated on cross-examination that, as far as she knew, she had never entertained a doubt as to defendant's guilt. She further stated that, while she could not say that she was ever uncertain, she was definitely certain of defendant's guilt when his jacket was reversed and his hair messed. Miss Lattos testified that she remembered the voice of the assailant and still remembered it at trial.

Miss Lattos' statement at trial that defendant did not look as young as she originally thought him to be does not substantially impair her credibility, in view of the immediate and positive identification of defendant as the assailant after his jacket was reversed, his hair messed and he, on request, spoke the words used by the assailant. The mere fact that she identified defendant as the assailant the second time she viewed him at the service station at 26th Street and Harlem

Avenue, rather than the first time does not impair her credibility. Miss Lattos stated at the trial that she wanted to be certain of the lesser facts before she attempted a positive identification, indicating that the delay was occasioned simply by caution. Nothing in the record indicates Miss Lattos entertained any doubt that defendant was the assailant.

Defendant theorizes that Mr. Spolar's evidence is valueless because he was a private citizen untrained in police investigation, and that his identification of defendant as the man he saw entering and emerging from the park is questionable because Mr. Spolar felt "his job is not complete until conviction is obtained." The matters testified to by Mr. Spolar, which were promptly reported to the police, needed no special training to observe. Furthermore the record in no way indicates that Mr. Spolar's actions were any other than those of a private citizen performing his civic duty.

The facts testified to by the State's witnesses create a full picture of the crime and the subsequent apprehension and arrest of the assailant. We cannot say the matters raised by defendant in any way impair the credibility of the State's witnesses so as to raise a reasonable doubt as to his guilt.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, J., and LYONS, J., concur.

49953

(62 I.A.2 481)

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHARLES WADE, Defendant-Appellant.

APPEAL FROM CIRCUIT COURT CRIMINAL DIVISION COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty of theft from the person at a jury trial and sentenced to two to ten years in the penitentiary. He appeals.

About 2:00 A.M. on June 2, 1963, Officers Billy Butler and Robert Pocius of the Chicago Transit Authority police force were riding a northbound elevated train in Chicago. No seats being available, the officers were standing in the center aisle of the coach. Occupying the seat immediately in front of the officers was the defendant, who was sitting with his left side next to the window, and a Mr. Peters, who was sitting next to the aisle and to the right of the defendant. Occupying the seat immediately in front of the defendant and Mr. Peters was the complaining witness, Mr. Jackson, who was also sitting next to the window. Both Mr. Jackson and Mr. Peters were asleep.

Officer Butler testified that he observed defendant extract a wallet with his left hand from Mr. Jackson's left hip pocket by reaching through the opening between the seat and the coach wall, and at the same time extract a wallet with his right hand from the left hip pocket of Mr. Peters. As defendant was retracting his hands, Officer Butler announced he was a police officer. Defendant thereupon threw the wallet in his right hand out of the coach window, and was about to throw out the wallet in his left hand when Officer Butler grabbed his left wrist and the wallet fell to the floor. The wallet was recovered, defendant was placed under arrest, and he and Mr. Peters were removed from the train. The train proceeded northward before Mr. Jackson, who

was still asleep, could be removed. Mr. Jackson was later notified of the incident and identified his wallet.

The testimony of Officer Pocius was substantially the same as that given by Officer Butler. The witness also testified that he not only observed the incident directly, but also observed it by way of reflection in the coach window which acted as a mirror in the nighttime.

The defendant offered no evidence in his behalf.

The trial which resulted in the conviction of the defendant was the last of three jury trials of this cause. The first trial resulted in a deadlocked jury on September 26, 1963. The second trial resulted in a mistrial on motion of the defendant on March 3, 1964, before the jury reached a verdict. Prior to the third and last trial of June 15, 1964, defendant filed a motion for discharge from custody pursuant to Section 103-5 of the Code of Criminal Procedure of 1963, commonly known as the Fourth Term Act, on the ground that more than 120 days had elapsed between his last continuance of February 10, 1964 and the date of his June 15th trial. Ill. Rev. Stat. 1963, Chap. 38, Par. 103-5. The motion for discharge was denied.

Defendant first contends that his motion for discharge should have been allowed for the reason that the mistrial of the second trial was the result of errors committed by the trial court, rendering the second trial a nullity in that it was not a "fair trial" as required by Section 9 of Article 2 of the Illinois Constitution; defendant argues that the 120 days of the Fourth Term Act began to run as of February 10, 1964, and was not interrupted by the declaration of the mistrial on March 3rd, and therefore more than 120 days elapsed between February 10th and June 15th. We are of the opinion that the declaration of the mistrial on March 3, 1964, on the motion of the defendant, interrupted the running of the Fourth Term Act, and that the 120 days began to run anew from that date.

Section 103-5 of the Code of Criminal Procedure of 1963

provides that a defendant shall be tried within 120 days of the date on which he was taken into custody. An exception is made, however, where a delay extends the time to more than 120 days, and the delay is occasioned by the defendant. Ill. Rev. Stat. 1963, Chap. 38, Par. 103-5 (a). In the instant case, not only did the defense counsel take part in the discourse between the court and defense counsel in the jury's presence which served as the basis of the mistrial of March 3, 1964, but the motion for the mistrial was granted at the instance of the defendant. The delay having been occasioned by the defendant, he is in no position to complain. See People v. Hamby, 27 Ill.2d 493. The cases of People v. Gilbert, 24 Ill.2d 201, and People v. Jonas, 234 Ill. 56, cited by defendant in support of his position are not in point.

Defendant next maintains that the trial court erred in refusing to give defendant's instruction number 5, relating to the impeachment of witnesses. Officer Butler testified at the first trial that he recovered the wallet of Mr. Jackson from the left hand of defendant, while at the third trial he stated that he grabbed the left wrist of defendant and the wallet was dropped or fell to the floor and was then recovered. Not only is this alleged discrepancy a trivial one, but on cross-examination of the officer at the third trial the following occurred after defense counsel pointed out the alleged discrepancy to the officer:

> "Q. Now, do you wish to revise your testimony as to that now?
> "A. No. Like I said, I would still consider the fact that I recovered the wallet from his hand because it was in his hand at the time that I placed him under arrest even though he did drop it to the floor."

As specifically noted by the trial judge when he refused defendant's instruction number 5, any alleged inconsistency between the testimony given by Officer Butler at the two trials was cured by his explanation at the third trial of what he meant by "recovered from defendant." The refusal to give the instruction was not prejudicial to the defendant.

Defendant further complains that the cross-examination of Officer Pocius was unduly restricted by the trial court. The matters raised by defendant in support of this contention are not supported by the record.

The trial court refused to allow the defense to ask Officer Pocius, on recross-examination, whether he testified at the first trial that the wallet was recovered from defendant's hand. It is difficult to see how this could prejudice defendant, since the alleged discrepancy is trivial and was explained by Officer Butler who testified before Officer Pocius, and since Officer Pocius admitted that the police report of the incident prepared by him stated that the wallet was recovered from the floor.

The trial court also denied the defense the use of photographs and drawings of the elevated train coaches. The defense, by their use, sought to totally impeach the testimony of the two officers as to what they stated they saw, on the grounds that the pictures showed that it was physically impossible to observe what the officers testified to. Defendant's offer of proof in no way indicates that the position from which the photographs were taken was the same position occupied by the officers at the time of the incident. While the offer of proof deals solely with impossibility of observation by way of reflection in the coach window, no indication is given that the angle of reflection portrayed in the photographs is the same as that experienced by Officer Pocius at the time of the incident, nor does the offer of proof intimate that the lighting conditions were identical. Furthermore, defense counsel stated that it was a possibility that the officers saw what they testified to. The use of the drawings and photographs would have served only to confuse the jury on these matters.

The trial court also refused to allow the above photographs and drawings to be used by the defense to "help Officer Pocius refresh his memory" as to the physical characteristics of the train coach. From

the record it does not appear that the officer needed to have his memory refreshed on this matter.

Defendant's contention that the trial court improperly refused to allow defendant's motion to exclude witnesses at the outset of the third trial is unfounded. The motion of defendant was not denied, but was in fact allowed. After the motion was made, the assistant state's attorney moved that one police officer, Officer Pocius, be allowed to remain in the courtroom to aid the State with its case. Not only is this standard procedure in the Circuit Court of Cook County, Criminal Division, (People v. Miller, 26 Ill.2d 305, 307,) but the defense neither objected to the State's request, nor requested that Officer Pocius be called as a witness before Officer Butler, nor made any comment concerning the presence of Officer Pocius in the courtroom until the officer was cross-examined, and then only after two witnesses had already testified for the State.

The other matters raised by the defendant have been considered and found to be without merit.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, J., and LYONS, J., concur.

49634

62 I.A.2 482

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
WILLIAM COLLINS,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of guilty of attempted robbery entered March 13, 1964 in the Criminal Court of Cook County, Illinois. The appellant was sentenced to the Illinois State Penitentiary for two to five years. The theories advanced on this appeal are first, that defendant was denied a fair trial by virtue of the incompetency of his counsel and that he has, therefore, been denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and second, that the evidence failed to prove defendant's guilt beyond a reasonable doubt.

According to the testimony of Daniel Scanlan, the officer who arrested the appellant, he was part of a police detail which operated in the area known as "Skid Row." The purpose of this detail was to cut down on the number of robberies practiced on those who were too drunk to defend themselves. This officer was dressed in businessman's clothes and testified that he was staggering down West Madison Street as though he were drunk. He said that by pre-arranged plan, he would turn into the side streets to see if anyone would try to rob him. His testimony was that when he turned into Peoria Street, the appellant, William Collins, grabbed him and began going through his pockets. The appellant is reported to have asked, "In what pocket do you carry your money?" At this time Scanlan announced he was a police officer, and he testified that the appellant tried to run away. He was subdued and taken into custody by Scanlan and another officer, James Fruin. The appellant was represented at his trial by a counsel of his own choosing. He was tried by the Court, a jury having been waived.

We hold that the evidence supports the finding of the Court that the defendant is guilty of attempted robbery beyond a reasonable doubt. The arresting officer gave a clear statement of the acts which led to the arrest of the appellant. It is the settled law that the testimony of one credible witness is enough to convict. People v. Crenshaw et al., 15 Ill.2d 458, 155 N.E.2d 599 (1959), People v. Soldat, 32 Ill.2d 478, 207 N.E.2d 449 (1965). We will not set aside the finding of a trier of fact unless the findings are clearly against the manifest weight of the evidence. People v. Crenshaw, supra, People v. Clark, 30 Ill.2d 216, 195 N.E.2d 631 (1964). We hold, therefore, that the finding of guilty entered by the trial court must be affirmed.

The other point raised by the appellant here is that the quality of his defense was so poor that he was, in fact, denied a meaningful trial, and that the proceedings were, therefore, contrary to the Fourteenth Amendment. While his counsel conducted cross-examination of the two witnesses for the People, he made no opening or closing statement and he did not put any witnesses on the stand for the defense. Does this amount to incompetence? We think not. Apparently the only witnesses to the incident were the police officers and the accused, and it is not suggested that the appellant had an alibi. Counsel for the appellant brought appellant's mother and sister to testify at the hearing in mitigation and aggravation. He argued earnestly for a lower sentence than that handed down by the Court. In People v. Olmstead, 32 Ill.2d 306, 205 N.E.2d 625 (1965) the Supreme Court was faced with a problem similar to this. There the Court said, "Nor do we believe that the failure to make oral argument before the judge or the failure to introduce evidence indicates that counsel did not adequately represent defendant.... Proper legal representation does not require the manufacturing of a defense when there is none, or the obfuscation of facts." The record in this case strongly indicates that the appellant attempted to rob a

policeman and that there was at least one other police officer who witnessed the event. There is no basis for defendant's contention that his counsel was incompetent in his representation of defendant. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.